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MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1304

FLORIN DENTE,

Petitioner,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL 90, an unincorporated labor organization,

Respondent.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF AUTHORITIES

Cases

Pa

Andrews v. Louisville and Nashville Railway Co., (1972) 406 U.S. 320 at page 325 .....

Ford Motor Co. v. Huffman, (1953) 345 U.S. 330 .....

Humphrey v. Moore, (1964) 375 U.S. 335, 351 .....

Motor Coach Employees v. Lockridge, (1971) 403 U.S. 274 .....

Operating Engineers Local 250 v. Flair Builders, (1972) 406 U.S. 487 .....

Vaca v. Sipes, (1967) 386 U.S. 171 6,

Wiley and Sons v. Livingston, (1964) 376 U.S. 543 .....

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Respondent, LOCAL 90 of the INTERNATIONAL ORGANIZATION OF MATES AND PILOTS (herein the Union), opposes the granting of the Petition for Certiorari in this case.

OPINION BELOW

The opinion below is reported at 492 F.2d (Adv.) 10.

QUESTIONS PRESENTED

In respondent's view, the questions presented are the following:

1. Is a union which represents only supervisory employees a "labor organization representing employees" within the meaning of Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185a)?

2. Does such a union, which has no statutory right of exclusive representation, owe a federal duty of fair representation?

3. May an employee sue his union under Section 301(a) for asserted breach of the procedural provisions of a collective bargaining agreement?

4. Does such a union breach a federal duty of fair representation because of its good faith delay in processing an individual grievance to arbitration, giving priority to collective bargaining negotiations and other problems affecting the majority of the union's members?

5. Absent breach of a duty of fair representation, is arbitration under the contract the exclusive remedy for an alleged violation of the contract, and is the arbitrator's award denying back pay final and binding on the employee as the contract provides?

STATEMENT OF THE CASE

Petitioner's statement is essentially correct except for the following:

1. The collective bargaining agreement (Record p. 81; plaintiff's Exhibit 13, p. 2) imposes no obligation upon the Union to process a grievance promptly. A review of the provisions discloses that the contract contains only an agreed-upon procedure for the handling of grievances and does not purport to require the Union to process a grievance promptly. The provision relied on by petitioner reads as follows:

Section III, paragraph 6:

> "6. Unless some other place is mutually agreed upon, the Board shall meet in San Francisco promptly upon written notice from either the Organization or the Employers."

2. Petitioner's statement does not point out the reasons why the Union delayed processing not only petitioner's grievance but all grievances pending completion of long

and involved collective bargaining negotiations. Respondent printed in its Brief to the Court of Appeals Defendants' Exhibit 106, a chronology describing the multitudinous problems facing the Union during the period petitioner's grievance was held in abeyance. A copy of that summary is attached to this Response as an appendix.

3. Petitioner's statement glosses over the reasons why the arbitrator denied back pay.

The arbitrator denied back pay for several reasons. (R. 20-21). He found that the petitioner had committed an offense (leaving work early) for which discipline short of discharge was justified. He found that the petitioner had not minimized his damage by taking other available employment. He found also that although the employer was guilty of delay in handling the grievance, the petitioner's Union was primarily responsible for the delay.

ARGUMENT

There are many reasons why the District Court's decision was incorrect and the Court of Appeals' reversal was correct. None of these issues are of such nature or importance as to require consideration by this Court.

I

The primary basis asserted for jurisdiction below is Section 301(a) quoted on page 3 of the Petition. The difficulty with this argument is that the Union represents only supervisory employees and it is therefore not a "labor organization representing employees" within the meaning of Section 301(a). This contention is summarized and rejected in the following quotation from the majority opinion of the Court of Appeals (492 F.2d (Adv.) pages 11, 12.):

"The threshold question is whether jurisdiction here exists under section 301(a), which vests jurisdiction in district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."

Appellant contends that since MMP represents only "supervisory" employees, and since section 501(3)[1] of the Labor-Management Relations Act, 29 U.S.C. § 142(3), and section 2(3)[2] of the National Labor Relations Act, as amended, 29 U.S.C. § 152(3), operate to exclude MMP from definition as a "labor organization *representing employees*" (emphasis added), jurisdiction cannot be predicated upon section 301(a). This rather mechanical approach to the statutory interpretation has found some judicial adherents. *See Masters, Mates & Pilots Union v. NLRB*, 351 F.2d 771 (D.C. Cir. 1965); *Pharmacists, Local 330 v. Lake Hills Drug Co.*, 255 F. Supp. 873 (W.D. Wash. 1964) (dictum). We, however, agree with the Second Circuit that Congress, by eliminating supervisory employees from the bargaining and organizational protection of subchapter II, did not intend to deprive members of "supervisory unions" of the rights secured by section 301. *E.g., National Marine Eng'rs Beneficial Ass'n v. Globe Seaways, Inc.*, 451 F.2d 1159, 1160, n. 1 (2d Cir. 1971); *United States v. National Marine Engr's Beneficial Ass'n*, 294 F.2d 385 (2d Cir. 1961); *Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 256 F. Supp. 68 (E.D. N.Y. 1966); *see United States v. National Marine Eng'rs Beneficial Ass'n*, 292 F.2d 190, 192 (2d Cir. 1961). We thus conclude that the complaint stated a claim within the District Court's jurisdiction."

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1. "The term 'employee'. . . shall not include . . . any individual employed as a supervisor. . . ."

2. "'(E)mployee'. . . shall have the same meaning as when used in subchapter II of this chapter (the original National Labor Relations Act) as amended by this chapter."

II

Even assuming that the District Court had jurisdiction, petitioner's novel theory that the Union violated the procedural provisions of the collective bargaining contract finds no factual support in the collective bargaining contract itself. The agreement simply provides a procedure for handling of grievances and places no burden on either the employer or the Union. The paragraph of the contract relied upon is quoted at page 2, *supra*.

III

If the Court were to consider the merits of petitioner's argument that the procedural provisions of the contract relating to grievance handling established a duty by the Union to process his grievance promptly, he faces a still further problem.

This Court has ruled that interpretation of the procedural provisions of a collective bargaining contract is for the arbitrator, not for the courts. *Wiley and Sons v. Livingston*, (1964) 376 U.S. 543 (see particularly footnote 12). *Operating Engineers Local 250 v. Flair Builders*, (1972) 406 U.S. 487. As this Court said in *Wiley, supra*, at page 558:

> "... Reservation of 'procedural' issues for courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort."

IV

The arbitrator could have awarded back pay but chose not to do so; his determination is final and binding. Having litigated his claim for back pay before the arbitrator, petitioner cannot litigate his claim for back pay in court.

The remedy, if any, for the procedural delay raises an issue which should be and was decided by the arbitrator. *Humphrey v. Moore,* (1964) 375 U.S. 335, 351.

> ". . . The decision of the committee reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. Drivers Union v. Riss & Co., 372 U.S. 517."

Compare also *Andrews v. Louisville and Nashville Railway Co.,* (1972) 406 U.S. 320 at page 325.

Where, as here, the grievance was arbitrated by the Union vigorously and fairly, the decision of the arbitrator must be final and binding, as the collective bargaining contract requires. The finality of the arbitrator's decision may be questioned only in cases where the union violates a duty of fair representation.

V

In *Vaca v. Sipes,* (1967) 386 U.S. 171, although the Court premises jurisdiction upon Section 301(a), the Court's analysis (386 U.S. at page 182) discloses that the real basis of jurisdiction in a suit against the Union was the right accorded to the Union under Federal law as the exclusive bargaining representative which gave rise to a statutory duty of fair representation. The duty of fair representation of unions subject to the Railway Labor Act, likewise finds its genesis in the Federal statute conferring bargaining rights on the union. For the reasons pointed out by Judge Browning in the following language in his concurring opinion the Union here, having no exclusive bargaining power granted to it under any Federal statute owed no statutory duty of fair representation (492 F.2d (Adv.) page 13.):

> "There was no breach of a federal duty of fair representation. This federal duty is a concomitant of t

right of exclusive representation conferred by section 9(a) of the National Labor Relations Act; no other source of the duty has been suggested. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Vaca v. Sipes, supra*, 386 U.S. at 177; *Retana v. Local 14, Elevator Operators, supra*, 453 F.2d at 1021-22; *Richardson v. Communications Workers of America*, 443 F.2d 974, 980 (8th Cir. 1971). But the appellant union was not granted exclusive bargaining power by section 9(a). Section 9(a) grants such power only to "representatives designated or selected for the purposes of collective bargaining by the majority of *employees*" (emphasis added). The members of appellant union are not "employees" for the purposes of section 9(a); they are all supervisors. *Cf. Hanna Mining Co. v. MEBA*, 382 U.S. 181, 188-89 (1965). Since no duty of fair representation is imposed upon appellant union by federal law, any duty with regard to representation owed to appellee by appellant union must be based upon state law and, absent an independent ground for federal jurisdiction, could be enforced only in state courts."

VI

The Court of Appeals determined that the Union's good faith delay in processing petitioner's grievance did not violate its duty of fair representation. This determination is in accordance with the decisions of this Court in *Vaca v. Sipes* (1967) 386 U.S. 171; and *Motor Coach Employees v. Lockridge*, (1971) 403 U.S. 274.

We are not here concerned with cases (such as *Vaca v. Sipes, supra*) in which a union fails or refuses to process a grievance or handles a grievance in a perfunctory manner, or delays handling the grievance for no valid reason. Here the delay in arbitration was compelled by circumstances (Appendix, infra). The delay was in recognition of the

necessity for an accomodation of all the Union's respon
bilities to all of its members. The good faith assignme
of priority to the negotiation of collective bargaini
contracts over the handling of grievances was well with
the permissible limits of union discretion under the decisio
of this Court. *Ford Motor Co. v. Huffman,* (1953) 345 U.
330; *Humphrey v. Moore,* (1964) 375 U.S. 335.

The Union had delayed processing all contractual gri
ances, primarily because of lengthy and protracted ne
tiations for new collective bargaining contracts. The Co
of Appeals correctly stated (492 F.2nd (Adv) page 11

> "Since the Local was involved in contract renegot
> tions, this grievance, as well as any others, was
> arbitrated until September, 1970. At that time, De
> was reinstated but the arbitrator declined to awa
> back pay".

There is neither evidence nor pleading of any unf
representation of petitioner, nor hostility toward him
even any contention of lack of good faith on the part of
union. The Union paid the costs of arbitration, includi
the arbitrator, the reporter and the attorney. (R.Tr. 67
and 123). Petitioner was offered the opportunity to h
his own counsel represent him but chose to be represen
by counsel paid by the Union. Petitioner conceded (P
tion for Certiorari, p.7, lines 22 et seq.), that this b
for liability had not been urged to the District Court. I
conceded that counsel selected by the Union did an ex
lent job in presenting the discharged employee's grieva
(Defendant's Ex. 104; Tr. 72).

The mischief which would be done if losing grieva
were permitted to sue their Union for lost pay in ev
case in which back pay is denied by an arbitrator in a
charge case is incalculable. In a great many cases, a

trators award reinstatement with only some or no back pay and necessarily in every case some time interval elapses between the grievant's discharge and the date of the arbitrator's decision. If a court were required to determine in every individual case whether or not the union, although acting in good faith, was somehow at fault in failing to secure earlier reinstatement, problems similar to those which this Court described in its decision in *Vaca v. Sipes*, (1967) 396 U.S. 171, 191, 192, would be presented.

This case raises a multitude of issues, none of which need to be re-determined by this Court.

This Court has delineated the applicable rules for the finality of labor arbitration decisions and this Court likewise has defined the circumstances when a union's actions in an arbitration proceeding may be challenged in Court. The decision below is in accord with the decisions of this Court. The three cases relied upon by petitioner on pages 11 through 13 of its petition appear to misinterpret *Vaca v. Sipes*, and in any event involve circumstances in which an inference of bad faith conduct might be drawn. In the present proceeding there is no claim of bad faith nor any basis for any inference of bad faith.

It is respectfully submitted insufficient reason is shown for the granting of certiorari.

Dated: May 7, 1974

JOHN PAUL JENNINGS
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(Appendix Follows)

Appendix

Chronology for Use by Captain Larson

I

Negotiations With PMA

1970	
Jan. 6-8	Coastwise Negotiation Committee—S.F. Committee reviewed PMA 10/23 and 11/6/69 which was full Agreement draft and Costing (85 pages) and re-drafted Section XXX—Jurisdiction language.
Jan. 9	Meeting with Pacific Maritime Association. Organization protested PMA's 12/18/69 letter as being unwarranted interference in Organization's affairs.
Jan. 13	Meeting with Pacific Maritime Association Full day's discussion between parties re Cost Package and Jurisdiction.
Jan. 15 to Feb. 15	MMP working at sub-committee level on MMP/PMA drafts and comparing areas of agreement and disagreement. Dr. Gallardo assisting in economics.
Feb. 16	Coastwise Negotiating Committee Meeting—S.F. Parties meeting on total Agreement. Some concessions by both parties.
Feb. 17 & 18	As before
Feb. 19 & 20	Parties resumed discussion Section XXX and Pilotage language.
Feb. 20-24	Coastwise Negotiation Committee meeting with PMA. MMP sub-committee drafting and voting on Majority and Minority Reports for presentation to Membership Meeting.
Mar. 2	Coastwise Negotiating Committee Meeting—S.F. MMP continues re-drafting language.
Mar. 3	Coastwise Negotiating Committee with PMA. Parties discuss Welfare benefits.
Mar. 4-10	Negotiating Sub-Committee Meetings with PMA. Sub-Committee members meet with PMA on areas of disagreement.
Mar. 16	Coastwise Negotiating Committee meeting—S.F. MMP continues language drafting.
Mar. 17, 18, 20	Coastwise Negotiating Committee Meeting with PMA. Continued negotiating with PMA in areas of disagreement.
Mar. 21	Coastwise Negotiating Committee Meeting—S.F. MMP resumed discussion of revised language.
Mar. 23	MMP continues as before.

Mar. 24	Coastwise Negotiating Committee Meeting with I Resume with PMA in areas of disagreement.
Mar. 25, 26, 27	MMP Sub-Committee discussions.
Mar. 30, 31	Coastwise Negotiating Committee meeting—S.F sumed with PMA on unresolved items.
Apr. 1, 2, 3	Coastwise Negotiating Committee meeting—S.F. continues re-draft.
Apr. 6 thru 13	Sub-Committee MMP continues negotiations PMA.
Apr. 14	Negotiating Sub-Committee—Captains Durkin Caldwell meeting with PMA.
April 16	Coastwise Negotiating Committee meeting. MM agrees by 5-4 vote to convene Postal Ballot mittee on 4/20 to prepare for ratification vote.
Apr. 17-18	Negotiating Sub-Committee meeting with PMA on Apr. 18, proceeding to Captain Larson's ho his signature on Agreement.
Apr. 20	Captain Tuttle convenes Postal Ballot Committ Ratification.
May 4, 5	Mr. Crooks and Captain Larson to PMA re I
May 6, 7, 8, & 11	Captain Larson to PMA re Agreement example
May 18-29	Hendy Tanker Negotiating Committee—S.F.
June 3, 4, 5	Hendy Tanker Negotiating Committee—S.F.
June 5	Ballot Committee (Patrolman)
June 29	Captain Durkin meets with E. Flynn, PMA, tributions.
June 30	Captain Larson to California Maritime Acaden
July 1	Captains Durkin and Larson meet with PMA.
July 3 & 9-13	Captain Durkin in L.A., meeting Hendy Intern Co.
July 13-22	Murphy-Pacific Negotiations.
July 17	Asst. Treasurer-Bookeeper left.
July 21-24	Auditors in office to assist and check records.
July 23-25	Meeting with Hendy International Co. in L.A.
July 29	Hendy Tanker Negotiating Committee meetin
July 30, 31 & Aug. 4 & 5	Licensed Personnel Board meeting—29 items.
Aug. 4-8	Hendy Negotiations meeting in L.A.
Aug. 10	Hendy Negotiations meeting—S.F.
Aug. 27-31	Hendy Negotiations meeting—S.F.—CRITICA
Sept. 1	Hendy Negotiations meeting with John P. Je
Sept. 3, 9, 11	Hendy Negotiations meeting—S.F.

II

Pension Plan Dispute

1. Dispute initiated in April by PMA's unilateral change of the contribution rate from $16.03 down to $12.39.

2. Dispute involved Union-PMA actuaries.

3. Membership vote up and down the coast to invoke No-sign-on policy August 26, 1970. No-sign-on policy in effect Sept. 22.

4. September 23rd, A.M.—struck Hendy.

5. September 24-September 25 dispute settled by payment of approximately $500,000.00 by PMA companies.

III

Implementation of PMA contract. Working out details for putting contract monetary clauses into effect.

IV

7. *MMP/PMA Trustees' Meetings:*
   March 19, 1970
   June 17, 1970
   June 18, 1970
   June 25, 1970—East Coast-West Coast Trustees meeting
   Dec. 11, 1969

V

Union Meetings

Dec. 15-20, 1969	International Executive Committee meeting—Brownsville, Texas.
Dec. 29-30, 1969	Local 90 Executive Committee meeting.
1970	
Jan. 5	Postal Ballot Committee S.F.—Patrolman's Election.
Jan. 14	Membership meeting—S.F.
Jan. 19-23	Meeting of Special Constitutional Committee—New Orleans.
Jan. 26-31	Constitutional Convention—New Orleans.
Feb. 1-6	Constitutional Convention—New Orleans.
Feb. 24	Meeting of Shareholder Trustees of MMP Bldg. Assn.
Feb. 25	Membership meeting—S.F.
March 21	Membership meeting.
April 8	Membership Meeting S.F.
April 20	Postal Ballot Committee meeting—S.F.—Ratification.
April 22	Membership Meeting S.F.
May 13	Membership Meeting S.F.
May 18	Postal Ballot Committee meeting—S.F.—Ratification.

June 3	Postal Ballot Committee meeting—S.F. Patrolman.
June 19	Local 90 Executive Committee meeting.
June 22	Permanent International Finance Committee —S.F.
June 23-25	International Executive Committee meeting-
June 24	Certification of Consolidation received, with at problems.
June 24	Membership Meeting—S.F.
June 26	Captains O'Callaghan, Larson and Mr.Crooks —S.F.
July 22	Membership Meeting—S.F.
Aug. 12 & 26	Membership Meeting—S.F.
Sept. 10	Membership Meeting—S.F.

Notes

August, 1969 — Helen Durkin death.

O. Larson ill—out of office March and April and August 8 thru Sept. 7 1970, ill.

G. Tuttle at sea until March; employed March 12, 1970 thru Sept. 11,